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Torture by Means of Rape

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NOTES

Torture by Means of Rape

EVELYN MARY ASWAD*

INTRODUCTION

They smelled of alcohol and cigarettes. . . . They removed some of my clothes and started to put their hands all over me. Then the man from Guatemala City said, "We will get to that later, we have to take care of business first." . . . He said they were going to ask me some questions. If I gave an answer that they liked he said that they would let me smoke; if they didn't like the answer, they would burn me with a cigarette. . . . Every time I answered they burned me with a cigarette. It didn't matter what answer I gave they burned me. . . . I was crying and screaming with pain. . . . Then one of them hit me in the face, so hard that I fell to the floor. . . . Two of them pulled me up to a sitting position. They took off the rest of my clothes and began to abuse me sexually, in horrible ways. I was raped by them repeatedly. Wine was poured on me and they used and abused my body in ways that are too disgusting and too humiliating for me to describe in detail. They told me they would stop if I gave them the names of the people in the photographs and the names of my contacts. At some points during the abuse, I passed out. At one point when I came to, I realized that my wrists had been tied to something overhead. . . . The policeman asked me again about the people in the photographs, and he raped me. . . . I was lowered into a pit. It seemed to be filled with bodies; I remember trying not to walk on them. There were rats falling on me. I passed out again. I remember waking up somewhere on the ground. The men were again amusing themselves with my body. . . . They held me down on the ground. They began to rape me again.¹

This is the account of Dianna Ortiz, a nun from the United States who went to Guatemala in 1987 to help persecuted communities of indigenous Kanjobal

*Associate, Arnold & Porter, Washington, D.C.; J.D., Georgetown University Law Center, 1995; B.S.F.S., Georgetown University School of Foreign Service, 1992. I would like to thank my parents for their encouragement and Professor Gregg Bloche for his assistance in writing this note, as well as the Ford Foundation for providing a grant during the summer of 1993 that allowed me to work on various issues regarding torture.

1. Declaration of Dianna Ortiz at 7-9, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (No. 91-11612-DPW) [hereinafter *Declaration*]. Ortiz submitted this declaration as part of her case against Hector Alejandro Gramajo, Guatemala's defense minister at the time of her torture, who was served with process at Harvard University after completing his studies there. John Abell, *U.S. Nun Files 10 Million Dollar Suit Against Guatemalan*, Reuter Libr. Rep., June 13, 1991, available in LEXIS, News Library, REUWLD File. The court awarded Ortiz three million dollars in compensatory damages for having been tortured. *Xuncax*, 886 F. Supp. at 199. However, Gramajo, who was a presidential candidate in Guatemala in 1995, has refused to pay his fine. Ken Myers, *Suit to Recoup Greenpeace Ships Is Clinic's Latest "Tilt at Windmill,"* NAT'L L.J., Nov. 13, 1995, at A21.

Indians.² In 1989, Ortiz began to receive anonymous and threatening letters, one of which stated, "Eliminate Dianna. Assassinate. Decapitate. Rape."³ On November 2, 1989, Guatemalan government officials abducted Sister Ortiz from a convent and tortured her in the manner she described.⁴ After her kidnapping and torture, Sister Ortiz abandoned her missionary work in Guatemala and returned to the United States, but was "unable to eat, or to sleep free of nightmares, or to resume [her] normal activities."⁵ Subsequently, Ortiz underwent two years of counseling and was later able to work for the Guatemalan Human Rights Commission-U.S.A. in Washington, D.C.⁶

Under the current international legal regime, the offenses committed against Sister Ortiz generally would be understood as torture—except for the gang rape.⁷ Rape by government officials typically is viewed as an inferior crime and is categorized as cruel, inhuman, or degrading treatment ("ill-treatment") that does not rise to the level of torture.⁸

2. *Declaration*, *supra* note 1, at 1-2.

3. *Id.* at 2-4. Rape by government officials, such as the gang rape of Sister Ortiz, is not an uncommon method of political terror. *See* AMNESTY INTERNATIONAL, RAPE AND SEXUAL ABUSE: TORTURE AND ILL-TREATMENT OF WOMEN IN DETENTION I (1992) [hereinafter RAPE AND SEXUAL ABUSE] (finding that "[i]n countries around the world, government agents use rape and sexual abuse to coerce, humiliate, punish and intimidate women"); AMNESTY INTERNATIONAL, WOMEN IN THE FRONT LINE 22 (1991) [hereinafter WOMEN IN THE FRONT LINE] (concluding "that rape of women prisoners by police, soldiers and guards has been widespread throughout the last decade"). *See generally* SUSAN BROWN-MILLER, AGAINST OUR WILL (1975) (tracing historical use of rape by government officials throughout world).

4. *Declaration*, *supra* note 1, at 5.

5. *Id.* at 11.

6. Cynthia Eagles, *Nun Recalls Guatemalan Nightmare*, *COURIER-J.*, Apr. 16, 1995, at A1.

7. *See* RAPE AND SEXUAL ABUSE, *supra* note 3, at 1 (reporting that "many governments persistently refuse to recognize that rape and sexual abuse by government agents are serious human rights violations"). *See generally* Deborah Blatt, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. REV. L. & SOC. CHANGE 821 (1992) (explaining that rape by government officials historically has not been, and is not generally, considered torture by international human rights organizations and tribunals).

This view of torture and rape as separate events or concepts is reflected in a complaint filed by Sister Ortiz before the Inter-American Commission on Human Rights. Amended Petition for Redress, *Ortiz v. Guatemala*, Case 10.526, Inter-Am. C.H.R. (filed Oct. 30, 1992). Her complaint charges Guatemala with violating the "American Convention on Human Rights for its role in the surveillance, death threats, kidnapping, torture, and rape of Sister Dianna Ortiz." *Id.* at 1. Thus, Ortiz's own complaint separates her rape from her torture, as though two forms of governmental abuse are alleged.

8. Blatt, *supra* note 7, at 832; *see also* Communication Respecting the Violations of Human Rights of Haitian Women, Inter-American Commission on Human Rights Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R. 32, OEA/ser.L./V/II.88, doc. 10 (1995) [hereinafter *Haitian Communication*] ("[T]he abuse of women, and particularly sexual abuse, until recently, has been invisible or regarded as less serious, as 'personal' rather than political. As a result, abuses against women have been treated as separate from torture, categorized simply as 'ill-treatment,' or ignored altogether in human rights investigations."). For example, the European Commission of Human Rights determined that mass rapes of Cypriot women were attributable to the Turkish government, but that such rapes only constituted ill-treatment and not torture under the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Cyprus v. Turkey*, App. No. 6780/74 & 6950/75, 4 Eur. H.R. Rep. 482, 537 (1976). Even the government of Cyprus merely alleged that the rapes constituted ill-treatment rather than torture. *Id.* at 536. For a discussion of the European Convention and the Commission with regard to torture, *see infra* notes 57-97 and accompanying text.

This note argues that rapes⁹ perpetrated both with government involvement and for political purposes should be classified as torture rather than ill-treatment under international law.¹⁰ Part I of this note addresses the legal and social

However, a few international organizations have recognized rape as a means of torture. One of the first was Amnesty International. See *WOMEN IN THE FRONT LINE*, *supra* note 3, at 18 (stating that “[i]n some countries rape by government agents is a common method of torture inflicted on women detainees”).

The United Nations Special Rapporteur on Torture also has recognized that rape can be a method of torture. The position of this rapporteur was created in 1985 to report to the United Nations Commission on Human Rights on matters relating to the prevalence of torture. See *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur*, U.N. ESCOR Commission on Human Rights, 42d Sess., Agenda Item 10(a), at para. 6, U.N. Doc. E/CN.4/1986/15 (1986) [hereinafter *1986 Special Rapporteur Report*]. In his first report, the Special Rapporteur stated that, as a general matter, torture could be inflicted by rape. *Blatt*, *supra* note 7, at 847 (citing to *1986 Special Rapporteur Report*). However, when describing individual cases, the Rapporteur “semantically separated the rape from torture, thereby giving the impression that two distinct abuses occurred.” *Id.* at 847-48. Likewise, almost a decade later, the Special Rapporteur again made a general statement that rape is an “especially traumatic form of torture for the victim.” *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment, Report of the Special Rapporteur*, U.N. ESCOR Commission on Human Rights, 50th Sess., Provisional Agenda Item 10(a), at para. 19, U.N. Doc. E/CN.4/1995/34 (1995) [hereinafter *1995 Special Rapporteur Report*]. However, when describing individual instances of rape, the Rapporteur separated rape from torture. *Id.* at para. 51 (stating that, with regard to Bangladesh, “the Special Rapporteur informed the Government that he had continued to receive reports of torture and rape by members of the military and paramilitary forces against tribal people”).

The Inter-American Commission on Human Rights recently recognized rape as a form of torture. Inter-American Commission on Human Rights Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R. 43, OEA/ser. L./V/II.88, doc. 10 (1995). The Inter-American Commission found that, following the overthrow of President Jean-Bertrand Aristide, the Haitian government perpetrated mass rapes against Haitian women. *Id.* at 39-43. The Commission concluded that such “rape represents not only inhumane treatment . . . under Article 5 of the [American Convention on Human Rights], but also a form of torture.” *Id.* at 43. The American Convention on Human Rights prohibits torture and ill-treatment in Article 5(2): “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 5, 1144 U.N.T.S. 123 (entered into force July 18, 1978). The Commission was created to promote human rights objectives and is empowered to promulgate reports on human rights situations in member states. *Id.* arts. 41, 44-51.

9. When referring to rape, this note employs the legal definition that virtually every U.S. jurisdiction uses: rape is forcible and nonconsensual sex. See Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1784 (1992).

10. This note does not address the issue of rape as a war crime—an act committed by government officials during a war against the citizens of an enemy nation. Instead, this note addresses whether rape by government officials during times of *peace* against their *own* citizens should be classified as torture or ill-treatment.

This note focuses on the rape of women because rape is “a form of torture primarily directed against women, and to which women are uniquely vulnerable.” RAPE AND SEXUAL ABUSE, *supra* note 3, at 2; see also *1995 Special Rapporteur Report*, *supra* note 8, at para. 18 (reporting that “[a]lthough allegations of sexual abuse were occasionally received wherein men were the target, the vast majority of such allegations concerned women”); GUUS VAN DER VEER, COUNSELLING AND THERAPY WITH REFUGEES: PSYCHOLOGICAL PROBLEMS OF VICTIMS OF WAR, TORTURE AND REPRESSION 232 (1992) (finding that “[p]olitical violence which is used against women usually has sexual aspects. . . . Rape is usually involved.”). Also, it should be noted that rapes against men are generally viewed as torture rather than ill-treatment. *Blatt*, *supra* note 7, at 849.

significance of viewing rape as ill-treatment rather than torture. As a legal matter, the classification of rape as ill-treatment systematically denies rape survivors¹¹ the protections and remedies available to torture survivors under international treaties and domestic laws. On a societal level, the separation of rape from torture perpetuates myths about rape and denies women an equal right to dignity, as protected by international human rights law.

To determine whether governmental rapes should be classified as torture or ill-treatment, Part II analyzes the difference between the international legal definitions of these two forms of abuse. This Part traces major events in the evolution of these two concepts with regard to several international and regional conventions. Ultimately, this Part suggests that one of the most significant legal distinctions between torture and ill-treatment is that torture is understood as inflicting more pain and suffering than ill-treatment.

Part III argues that the severe suffering caused by rape is comparable to that inflicted by torture, thus justifying the treatment of rape as torture under international law. This Part begins by comparing medical studies of rape survivors with similar studies of torture survivors. This comparison reveals that the psychological aftermath of rape is strikingly similar in intensity and duration to that experienced by other torture survivors. This Part then argues that, because of the unique impact of rape as a method of torture, rape may inflict even more trauma than other forms of torture, thereby inflicting "torture plus" on women. Part III concludes that, when government officials rape for political purposes, such rapes inflict at least torture and not merely ill-treatment.

I. RAMIFICATIONS OF VIEWING RAPE AS ILL-TREATMENT

Classifying rape as ill-treatment rather than torture has two important and related consequences. Because international and domestic laws provide torture survivors rights that are not afforded to survivors of ill-treatment, rape survivors are denied important legal protections. In addition, viewing rape and torture as different offenses or experiences perpetuates the myth that rape is a private, sexual act rather than a political weapon and reinforces notions that a woman's dignity, including her right to mental and bodily integrity, is less worthy of protection than is a man's.

A. LEGAL CONSEQUENCES

International law explicitly grants more protections and remedies to torture survivors than to survivors of ill-treatment. For example, the Convention against

11. This note employs the term rape "survivor" rather than rape "victim" because the use of victim "is stigmatizing . . . [and] it contradicts the most fundamental aim of survivor care, namely, to eliminate the victim role." Metin Basoglu, *Prevention of Torture and Care of Survivors*, 270 JAMA 606, 606 (1993).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹² affords torture survivors numerous significant rights. First, neither "exceptional circumstances" nor "[a]n order from a superior officer" can ever justify the use of torture.¹³ Second, the Torture Convention prohibits parties from returning or extraditing an individual to a country when "there are substantial grounds for believing that he would be in danger of being subjected to torture."¹⁴ Third, the Convention requires parties to criminalize acts of torture in their domestic legal systems,¹⁵ to make such acts punishable,¹⁶ and to ensure that a torture survivor "obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."¹⁷ Fourth, parties to the Torture Convention must treat torture as an extraditable offense between each other¹⁸ and help each other pursue complaints of torture.¹⁹ Finally, the Committee against Torture, a body created by the Convention to monitor the implementation of its provisions,²⁰ has jurisdiction to investigate allegations of a party's regular use of torture.²¹

Survivors of ill-treatment are not afforded any of these protections. The Torture Convention only requires that state parties prevent ill-treatment, educate against it, and afford survivors a prompt and impartial investigation of their complaints if there are reasonable grounds to believe that ill-treatment occurred.²² States are not required to prohibit ill-treatment in their criminal codes, punish the wrongdoers, compensate survivors of ill-treatment, or make ill-treatment an extraditable offense. In addition, states may return individuals to nations where they face the danger of ill-treatment. Furthermore, the Committee against Torture does not have the power to investigate allegations of a party's systematic use of ill-treatment.

When rape is classified as ill-treatment, rape survivors are denied potent legal

12. G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72/Annex (1984), reprinted in 23 I.L.M. 1027, as modified, 24 I.L.M. 535 (1984) [hereinafter *Torture Convention*]. The Torture Convention, the primary international treaty prohibiting torture and ill-treatment, is binding not only on its signatories, but also on all states as a codification of customary international law. See J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1, 12 (1988). For an analysis of the Torture Convention's provisions regarding the distinction between torture and ill-treatment, see notes 54-56 and accompanying text.

13. *Torture Convention*, supra note 12, art. 2.

14. *Id.* art. 3, § 1.

15. *Id.* art. 4, § 1.

16. *Id.* art. 4, § 2.

17. *Id.* art. 14, § 1.

18. *Id.* art. 8.

19. *Id.* art. 9, § 1.

20. *Id.* arts. 17-24.

21. *Id.* art. 20, § 1 ("If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.").

22. *Id.* art. 16, § 1.

protections and remedies afforded to torture survivors.²³ As the U.S. legal system has revictimized rape survivors,²⁴ the present international legal regime effectively revictimizes rape survivors by failing to recognize a cause of action or remedies for the crime committed.²⁵

The classification of rape as ill-treatment rather than torture also has legal consequences for the rape survivor in her domestic legal system. For example, in the United States, the Torture Victim Protection Act of 1991 ("TVPA")²⁶ permits torture survivors, but not survivors of ill-treatment, of any nationality to bring civil suits for damages in U.S. courts against the individuals who tortured them.²⁷ Aliens who are survivors of torture may also sue both the governments and individuals who tortured them under the Alien Tort Claims Act of 1789 ("ATCA").²⁸ If rape is not understood as a form of torture, rape survivors may be denied such important legal recourse.

Viewing rape as separate from torture also has detrimental effects for female

23. Rape survivors might also be denied the protection and compensation offered by international organizations. For example, the United Nations affords torture survivors access to its Voluntary Fund for Victims of Torture, which provides financial and legal aid to qualified recipients. See NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 137-40 (1987). If survivors of sexual abuse are not considered torture survivors, they might be denied this form of compensation.

24. See generally LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1991).

25. According to one researcher who has studied the effect of human rights violations on individuals,

Sharing the traumatic experience with others is a precondition for the restitution of a sense of a meaningful world The response from the community has a powerful influence on the ultimate resolution of the trauma. Once it is publicly recognized that a person has been harmed, the community must take action to assign responsibility for the harm and to repair the injury. These two responses—recognition and restitution—are necessary to rebuild the survivor's sense of order and justice

JUDITH L. HERMAN, *TRAUMA AND RECOVERY* 70-73 (1992).

26. 28 U.S.C. § 1350 (1994).

27. *Id.* Sister Ortiz, for example, won compensatory damages under a retroactive application of the TVPA against Gramajo. *Xuncax v. Gramajo*, 886 F. Supp. 162, 198-99 (D. Mass. 1995). For a discussion of the scope and use of the TVPA, see generally Robert F. Drinan & Teresa T. Kuo, *Putting the World's Oppressors on Trial: The Torture Victim Protection Act*, 15 HUM. RTS. Q. 605 (1993).

28. 28 U.S.C. § 1350 (1994) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The ATCA is broader than the TVPA because it allows recovery for *any* tort that violates international law. See Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 181-82 (1994). In a companion case to Sister Ortiz's, several Guatemalans sued Gramajo under the ATCA and recovered for both the torts of torture and ill-treatment. *Xuncax*, 886 F. Supp. at 197-98. The court held that torture clearly violated international law norms and that ill-treatment, while "present[ing] a closer question," was also universally prohibited. *Id.* at 186. The court ordered damages for both forms of abuse but awarded greater monetary recovery for the torture violations. *Id.* at 198. Not all U.S. courts, however, have allowed for recovery for the tort of ill-treatment under the ATCA. See, e.g., *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) (finding that no international consensus exists as to definition of ill-treatment and therefore not allowing recovery under ATCA). Thus, classifying rape as ill-treatment could either prevent lawsuits under the ATCA and the TVPA or provide for less monetary compensation because ill-treatment is viewed as a less severe crime than torture.

rape survivors seeking political asylum. U.S. asylum law requires applicants to prove that they were persecuted or that they have a well-founded fear of persecution because of their "race, religion, nationality, membership in a particular social group, or political opinion."²⁹ Until recently, many U.S. judges did not interpret such "persecution" as encompassing rape by government officials and therefore denied rape survivors asylum.³⁰ Immigration officials often viewed such sexual violence as "private act[s]" or "street crime[s]" rather than as torture.³¹ On May 26, 1995, the Immigration and Naturalization Service ("INS") promulgated guidelines for asylum adjudications that recognize sexual abuse and rape as potential forms of persecution.³² But the United States is among the few countries that have formal guidelines for female asylum cases;³³ thus, rape survivors may continue to be denied asylum in other countries merely because adjudicative officers do not view rape by government officials as a serious human rights violation.

B. SOCIETAL CONSEQUENCES

The legal distinction between rape and torture, in turn, produces consequences for society. Indeed, "[l]egal language does more than express thoughts. It reinforces certain world views and understandings of events."³⁴ In other words, "[i]n patriarchal social systems [such as the international legal system], men have controlled oral and written production of language . . . [that] reflects and reifies the experiences of men. To the extent that this language does describe the experiences of women, it does so from the perspective of men."³⁵ The prevalent distinction between rape and torture under international law

29. 8 U.S.C. § 1101(a)(42)(A) (1994).

30. For example, in 1988 an immigration judge denied asylum to a woman from El Salvador who was raped by a soldier after he accused her of being a guerrilla and searched her house. *WOMEN IN THE FRONT LINE*, *supra* note 3, at 49. The judge held the rape was not persecution, as it "was more because she was a female convenient to a brutal soldier acting only in his own self-interest." *Id.* Similarly, in 1992, a Haitian woman sought asylum after being gang raped by three soldiers who mocked her support of Jean-Bertrand Aristide, but the judge determined that rapes were not political persecution. *See* Lena H. Sun, *INS Expands Asylum Protection for Women*, WASH. POST, June 3, 1995, at A4.

31. Ashley Dunn, *U.S. to Accept Asylum Pleas for Sex Abuse*, N.Y. TIMES, May 27, 1995, at 1.

32. *Id.*

33. *Id.* (Canada established such guidelines in 1993). In August 1995, the Austrian Home Minister decreed rape survivors should be granted asylum, thereby making Austria "the first west European country to take a stand on" the issue of rape as a form of political persecution. Senthil Ratnasabapathy, *Women: Beijing Meet Urged to Take Action to Halt Rape in War*, Inter Press Serv., Sept. 1, 1995, available in LEXIS, News Library, INPRES File.

34. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989). For example, the legal language in Ortiz's complaint, which separated her rape from her torture, was reflected in the language used by the media to describe the abuse inflicted on her. U.S. newspaper articles merely replicated Sister Ortiz's legal allegations that she was kidnapped, raped, and tortured rather than reporting that her torture included rape. *See, e.g.*, Daniel Alder, *U.S. Nun Will Push for Justice in Rape Case*, UPI, Apr. 10, 1992, available in LEXIS, News Library, UPI File.

35. Charlene Muehlenhard et al., *Definitions of Rape: Scientific and Political Implications*, 48 J. SOC. ISSUES 23, 23 (1992).

appears to reify two male-oriented "world views" regarding forcible sex and women's dignity. The first view is that rape is a private, sexually motivated act rather than a systematically chosen means of aggression and political repression.³⁶ Many studies on rape, however, have concluded that "rape is not primarily a sexual act . . . [R]ape is primarily an act of violence with sex as the weapon."³⁷ Additionally, to view rape as a private act of sex completely disregards the rape survivor's experience that "[r]ape is a crime against the person, not against the hymen."³⁸

The second view reinforced by classifying rape as ill-treatment is that a woman's dignity is less worthy of protection than a man's. One legal scholar has observed that throughout history the law of rape has treated women as men's property and has therefore not protected women's rights to sexual autonomy and bodily integrity.³⁹ For example, the English common law on rape

36. The view that rape is a private, sexual act may be one of the greatest obstacles to the classification of rape as torture. See Blatt, *supra* note 7, at 832. Recent INS guidelines regarding rape and other sexual abuse were promulgated to overcome the agency's and immigration courts' pervasive view that such abuse constitutes personal acts of sexual gratification rather than a form of political persecution. See Dunn, *supra* note 31, at 1. The new guidelines do not give women " 'expanded rights, just the same rights [men have always had] since up until now [women] have been judged by a male standard.' " *Id.* (quoting attorney for Women Refugees Project).

In Ortiz's case, one of the torturers attempted to characterize her gang rape as separate acts of sexual pleasure when he told his fellow torturers "[w]e will get to that [the rapes] later, we have to take care of business [the torture and confession] first." *Declaration*, *supra* note 1, at 7. However, the torturers later told Sister Ortiz that they would stop raping her if she revealed the desired information. *Id.* at 8-9. Thus, although the male torturers initially tried to view the rapes as private acts of sex, they later explicitly used rape as a means to extract a confession from Ortiz, as part of the torture or "business" at hand.

37. Ann W. Burgess & Lynda L. Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974); see also Murray L. Cohen et al., *The Psychology of Rapists*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM AND THE OFFENDER* 291, 298 (Duncan Chappell et al. eds., 1977) (finding that "[s]exual assault is primarily an aggressive, destructive act . . . not the expression of a sexual wish but in the service of the aggression, serving to humiliate, dirty, and defile the victim"); A. Nicolas Groth et al., *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY 1239, 1242 (1977) ("Rape, . . . rather than being an expression of sexual desire, in fact is the use of sexuality to express issues of power and anger."). But see Lee Ellis, *A Synthesized (Biosocial) Theory of Rape*, 59 J. CONSULTING & CLINICAL PSYCHOL. 631, 632 (1991) (suggesting that sex drive is an important motivating factor for rapists).

38. Deena Metzger, *It Is Always the Woman Who Is Raped*, 133 AM. J. PSYCHIATRY 405, 406 (1976); see also Malkah T. Notman & Carol C. Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408, 410 (1976) ("Although aggression is most prominent in the victim's perception, society regards rape as sexual."). For a discussion of the female rape survivor experience, see *infra* Part III.

Sister Ortiz, for instance, appears to have understood her gang rape not as separate sexual acts, but as part of the overall aggression directed towards her by the Guatemalan torturers. In her declaration, Ortiz generally did not separate her rape from her torture. She stated, "I returned to Guatemala for the first time since my kidnapping and torture, in order to testify in court . . . I relived the horror and pain of the kidnapping and torture . . . My kidnapping and torture is still with me every day." *Declaration*, *supra* note 1, at 12-13. However, when referring to her lawsuit, she said, "I brought this suit . . . for my having been kidnapped, tortured, and raped." *Id.* at 13. Reference to the law seemed to distort her experience by separating the torture from the rape.

39. See Dripps, *supra* note 9, at 1780-83 (tracing historical legal treatment of rape, including ancient Near Eastern codes and Roman law); see also BROWNMILLER, *supra* note 3, at 16-30 (discussing how law of rape has been used to secure male access to women).

“protected male as opposed to female interests.”⁴⁰ Although the rape of a virgin implicated the King’s Peace, the rapist’s sentence could be nullified if he married the woman he assaulted.⁴¹ In cases of the gang rape of a virgin, only one rapist could be punished because only one had stolen her virginity.⁴² The rape of nonvirgins, however, was dealt with through lower, feudal courts or private means of justice.⁴³ In short, English common law “struck a balance between the interests of males-in-possession and their predatory counterparts.”⁴⁴ Similarly, the prevalent view of rape as ill-treatment rather than torture under international law strikes a balance between such male interests and abandons a more rational and fair scheme—classifying rapes by their true purpose and impact on female survivors.

II. THE LEGAL DISTINCTION BETWEEN TORTURE AND ILL-TREATMENT

To determine whether rape by government officials should be classified as torture or ill-treatment, the legal distinction between these two types of governmental abuse must be clarified. This Part examines the distinction between torture and ill-treatment by tracing the evolution of these concepts under several international and regional conventions.

A. INTERNATIONAL DEVELOPMENTS

1. The Universal Declaration of Human Rights

In 1948, the United Nations General Assembly unanimously adopted the Universal Declaration of Human Rights,⁴⁵ a document intended to define the broad human rights contained in the U.N. Charter.⁴⁶ The Universal Declaration articulated the first international prohibition on torture,⁴⁷ providing that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”⁴⁸ However, because the Universal Declaration neither explained

40. Dripps, *supra* note 9, at 1782.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

46. RODLEY, *supra* note 23, at 60. Although the Universal Declaration was originally a mere recommendation and thus nonbinding, many scholars have argued that it is binding on all nations because it has been incorporated into the U.N. Charter. *See, e.g., id.* at 61. Others have argued that the Universal Declaration is binding as an expression of customary international law. *See, e.g.,* Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3, 11 (Hurst Hannum ed., 1984).

47. Hans Danelius, *Protection Against Torture in Europe and the World*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 263, 263-65 (Ronald S. MacDonald et al. eds., 1993) [hereinafter *PROTECTION OF HUMAN RIGHTS*].

48. *Universal Declaration*, *supra* note 45, art. 5. This prohibition has served as the “basic formula” for subsequent international and regional prohibitions on torture and ill-treatment. RODLEY, *supra* note 23, at 71.

the distinction between torture and ill-treatment nor created a specific enforcement mechanism, the legal distinction between the two forms of abuse remained ambiguous.

2. The Declaration Against Torture

The next major step in the U.N.'s attempt to eradicate torture and ill-treatment occurred in 1975 when the General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁹ The Torture Declaration defined torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.⁵⁰

Thus, under the Torture Declaration, torture consists of three elements: (1) the intentional infliction of severe pain or suffering (2) for one of several illicit political purposes (3) by or at the instigation of government officials. Significantly, the Torture Declaration did not specifically define ill-treatment, providing instead that "[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."⁵¹ Two factors, therefore, appear to distinguish torture from ill-treatment under the Torture Declaration. First, torture inflicts greater pain than does ill-treatment. Second, torture has a deliberate or purposeful element.

3. The Torture Convention

Because of its nonbinding nature and failure to provide an international monitoring mechanism, the Torture Declaration soon proved to be ineffective in combatting torture. Thus, within two years of the Torture Declaration's adoption, the General Assembly authorized the drafting of a convention outlawing torture.⁵² In 1987, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵³ came into effect.

49. G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10408 (1975) [hereinafter *Torture Declaration*].

50. *Id.* art. 1.

51. *Id.*

52. BURGERS & DANIELIUS, *supra* note 12, at 33-34.

53. See *supra* note 12 and accompanying text.

Under the Torture Convention, torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁵⁴

Thus, for abuse to constitute torture, three elements must be satisfied: (1) severe mental or physical pain or suffering must have been inflicted intentionally, (2) for one of a broad range of illicit political purposes, and (3) with a sufficient level of government involvement. In defining torture, the Torture Convention differs from the Torture Declaration in two significant ways. First, under the Convention more purposes qualify as illicit. Second, the Convention appears to lower the threshold for proving government involvement.

Although the Torture Convention provides an explicit, multipronged definition of torture, it does not contain an equally clear description of ill-treatment. The closest the Convention comes to defining ill-treatment is in its requirement that

[e]ach State Party shall undertake to prevent in any territory under its jurisdiction *other* acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁵⁵

Under this framework, a finding of ill-treatment requires government involvement of the same degree required for a finding of torture. Ill-treatment, therefore, must fail to "amount to torture" either because (1) ill-treatment does not inflict the requisite level of severe pain or (2) ill-treatment is not inflicted for an illicit purpose. This distinction between torture and ill-treatment generally parallels that drawn by the Torture Declaration.⁵⁶

54. *Torture Convention*, *supra* note 12, art. 1, § 1.

55. *Id.* art. 16, § 1 (emphasis added).

56. See *supra* notes 49-51 and accompanying text. The *travaux préparatoires* of the Torture Convention do not seem to clarify the distinction between torture and ill-treatment. See BURGERS & DANIELIUS, *supra* note 12, at 41-47, 70-72, 80. The most significant aspect of the negotiating history is an apparent disagreement over whether to include the phrase "[t]orture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." *Id.* at 44-47, 70-73. This phrase seems to have been deleted from the final draft of the Convention due to the concern of many parties that, because ill-treatment could not be defined, it should not form part of the definition of torture. Also,

B. REGIONAL DEVELOPMENTS: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Although the international agreements discussed above provide some indication as to the meaning of the torture/ill-treatment distinction, the richest jurisprudence interpreting this distinction comes from the tribunals charged with implementing the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁷ Article 3 of this treaty provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁵⁸ The European Convention, therefore, prohibits three types of government actions: torture, inhuman abuse, and degrading abuse. However, neither the text of the treaty nor its *travaux préparatoires* clarifies the distinction between torture and ill-treatment.⁵⁹ This Section examines the distinction drawn by the two bodies empowered to implement the European Convention: the European Commission of Human Rights ("European Commission") and the European Court of Human Rights ("European Court").⁶⁰

1. *The Greek Case*

In 1969, the European Commission first articulated the distinction between torture and ill-treatment in *The Greek Case*.⁶¹ In this case, the applicant governments alleged that Greece's treatment of its political prisoners violated Article 3 of the European Convention.⁶² The Commission's decision began by explaining the difference between torture and ill-treatment:

[A]ll torture must be inhuman and degrading treatment, and inhuman treat-

many parties believed that the gravity of the torture concept could be inferred from the Convention's other provisions, particularly Article 16. *Id.* at 80. The effect this deletion has on the distinction between torture and ill-treatment remains unclear.

57. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *European Convention*]. This Convention was adopted to fulfill, on a regional level, the goals stated in the Universal Declaration. See Juan A. Carrillo Salcedo, *The Place of the European Convention in International Law*, in PROTECTION OF HUMAN RIGHTS, *supra* note 47, at 15, 16.

58. *European Convention*, *supra* note 57, art. 3.

59. Antonio Cassese, *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in PROTECTION OF HUMAN RIGHTS, *supra* note 47, at 225, 225-28.

60. Although the Commission and the Court have found numerous instances of ill-treatment, the Commission has only identified two instances of torture and the Court has never found an instance of torture under the European Convention. *Id.* at 242. This note focuses on four important cases that form the framework for the distinction between torture and ill-treatment under the European Convention.

The European Commission is empowered to hear complaints from individuals, nongovernmental organizations, and states regarding violations of the European Convention by member states (if those states have recognized the Commission's competence to hear such complaints). *European Convention*, *supra* note 57, arts. 24-25. The Commission can investigate such complaints, attempt to settle them, report findings of fact, and determine breaches of the Convention. *Id.* arts. 28, 30-31. After the Commission renders a decision, the case may be appealed to the European Court if the Commission or the state involved refers the case to the Court and the state has accepted the Court's jurisdiction. *Id.* art. 48.

61. 1969 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.).

62. *Id.* at 186.

ment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. . . . "[T]orture" [in addition to constituting inhuman treatment] has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.⁶³

According to this explanation, there exists a hierarchy of abuse: torture is the most serious form of abuse; inhuman abuse is not as severe as torture, but worse than degrading abuse; and degrading abuse is the least severe. The Commission defined torture as *aggravated and severe* abuse *deliberately* inflicted for a political *purpose* while defining inhuman abuse as *severe* abuse that is *deliberately* inflicted and unjustifiable.⁶⁴ Torture, therefore, is distinguished from inhuman abuse because: (1) torture inflicts aggravated abuse—more pain than inhuman abuse, and (2) torture has a political purpose.⁶⁵ Degrading abuse, altogether different from torture and inhuman abuse, is identified merely by the infliction of humiliation or debasement; the government's purpose is irrelevant.

Applying these definitions, the European Commission found that the Greek government's use of such abuses as *falanga*,⁶⁶ severe beatings, "electric shock, squeezing of the head in a vise, pulling out of hair from the head or pubic region, . . . kicking of the male genital organs, dripping water on the head, and intense noises to prevent sleep"⁶⁷ constituted "torture *or* ill-treatment."⁶⁸ Even after explicitly delineating a legal distinction between torture and ill-treatment, the European Commission failed to specify which of the above-listed governmental abuses constituted torture and which were ill-treatment. Thus, although the

63. *Id.* This pronouncement greatly influenced the subsequent international legal development of the torture and ill-treatment distinction. RODLEY, *supra* note 23, at 73.

64. The Greek Case, 1969 Y.B. Eur. Conv. on H.R. at 186. The use of "unjustifiable" in the definition of inhuman treatment has been harshly criticized because Article 15 of the European Convention permits no derogation from the prohibition against torture and ill-treatment. *See* Cassese, *supra* note 59, at 248. The Commission may have abandoned this notion of "unjustifiability" in a later case. *See* Ireland v. United Kingdom, 1976 Y.B. Eur. Conv. on H.R. 512, 750 (Eur. Comm'n on H.R.) (holding that "the term 'unjustifiable' . . . has given rise to some misunderstanding and therefore [we find] it necessary to state clearly that [we] did not have in mind the possibility that there could be a justification for any treatment in breach of Art. 3").

65. This observation is consistent with the preceding analysis of the Torture Declaration and the Torture Convention. *See supra* notes 49-56 and accompanying text; *see also* BURGERS & DANIELIUS, *supra* note 12, at 150 (noting that, with respect to inhuman abuse under the Torture Convention, "the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment or punishment").

66. *Falanga* is "a method of torture known for centuries. It is the beating of the feet with a wooden or metal stick or bar which, if skillfully done, breaks no bones, makes no skin lesions, and leaves no permanent and recognisable marks, but causes intense pain and swelling of the feet." The Greek Case, 1969 Y.B. Eur. Conv. on H.R. at 499.

67. *Id.* at 500.

68. *Id.* (emphasis added).

European Commission elaborated the first specific analysis for distinguishing acts of torture from ill-treatment, the Commission failed to apply the analysis to the facts of the case, thereby leaving the distinction between torture and ill-treatment unclear. In addition, when identifying these Article 3 violations, the Commission did not cite to or discuss any medical or other evidence about the level of physical or psychological pain experienced by the survivors.⁶⁹ Instead of applying a principled analysis for identifying the infliction of severe pain and distinguishing between acts of torture and acts of ill-treatment, the European Commission appears to have used a de facto "we know an Article 3 violation when we see one" test.⁷⁰

2. *Ireland v. United Kingdom*

The European Commission and European Court further elaborated on the distinction between torture and ill-treatment in the landmark case of *Ireland v. United Kingdom*.⁷¹ In this case, the Irish government alleged that England's combined use of five sensory deprivation techniques⁷² against its prisoners violated Article 3 of the European Convention.⁷³ The Commission held that these disorientation techniques constituted torture because they inflicted very severe pain for the purpose of obtaining information from the prisoners.⁷⁴ Although the European Commission determined that the five techniques imposed suffering that surpassed the level required for inhuman abuse,⁷⁵ the

69. For example, the Commission found that the Greek government had inflicted torture or ill-treatment on Nicolas Vardikos. *Id.* at 504. He had been subjected to beatings "all over his body, especially on his belly and on his genitals[,] . . . was kept in isolation . . . for 17 days without food and drink . . . [A]n iron clamp . . . was placed on his head and screwed into both sides of his temples" *Id.* at 204-05. The Commission did not cite medical evidence in determining whether the level of pain inflicted by these acts reached the severity of an Article 3 violation. Instead, the Commission relied on medical evidence only to determine whether the alleged abuses had occurred. *Id.* at 207.

70. The Commission also applied this test when it held that the conditions of detention at one prison breached Article 3. *Id.* at 505. Specifically, the Commission determined that "the complete absence of heating in winter, the lack of hot water, the poor lavatory facilities, the unsatisfactory dental treatment, and the close restriction of letters and visits to prisoners" amounted to an Article 3 violation. *Id.* at 489. However, the Commission did not state that it had relied on any medical or other evidence in determining that these conditions inflicted pain severe enough to constitute an Article 3 violation.

71. 1976 Y.B. Eur. Conv. on H.R. 512 (Eur. Comm'n on H.R.).

72. These techniques were wall-standing, hooding, exposure to loud noise, deprivation of sleep, and deprivation of food and drink. *Id.* at 784. The wall-standing technique involved prisoners standing "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers." *Id.* In the hooding technique, "a black or navy coloured bag was put over the witnesses' heads." *Id.* The noise technique required that witnesses be "held in a room where there was a continuous loud and hissing noise" before their interrogations. *Id.*

73. *Id.* at 793.

74. *Id.* at 792-94.

75. Specifically, the Commission stated:

[c]ompared with inhuman treatment[,] . . . the stress caused by the application of the five techniques is not only different in degree. The combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality

Commission failed to cite to evidence of the specific level of pain inflicted upon the prisoners. Indeed, the Commission admitted that it was "unable to establish the exact degree of psychiatric after-effects which the use of the five techniques might have had on [the prisoners]." ⁷⁶

Once again, the European Commission forwent a principled analysis and relied on its "we know it when we see it" approach for determining Article 3 violations. The Commission did, however, provide some guidance as to what standards it implicitly refers to in determining whether abuse constitutes torture. In identifying the five techniques as torture, the Commission likened them to "traditional" forms of torture. ⁷⁷ This comparison to traditional forms of torture suggests: (1) that certain abuses automatically qualify as torture because they are considered well-recognized, traditional forms of torture; and (2) that classification of "nontraditional" abuses as torture depends on their similarity to these recognized, but unenumerated, acts of torture.

The European Court overruled the Commission and held that the five techniques inflicted only inhuman and degrading treatment. ⁷⁸ The Court explained that for abuse to constitute ill-treatment, it must reach "a minimum level of severity," which is a relative assessment. ⁷⁹ The Court continued by noting that the primary distinction between the torture and ill-treatment "*derives principally from a difference in the intensity of the suffering inflicted.*" ⁸⁰ The Court also observed that a finding of torture attaches a "special stigma to deliberate

physically and mentally. The will to resist or give in cannot, under such conditions, be formed with any degree of independence.

Id. at 792.

76. *Id.* at 786. The Commission was presented with conflicting expert testimony regarding the psychological aftermath of the five techniques. One group of psychiatrists testified that prisoners subjected to the five techniques would "continue for a long time to have considerable disability shown by bouts of depression, insomnia and a generally neurotic condition resembling that found in victims of Nazi persecution." *Id.* However, other experts testified that "the acute psychiatric symptoms developed by the witnesses during the interrogation had been minor and that their persistence was the result of everyday life in Northern Ireland." *Id.*

The Commission also noted that the only evidence of physical pain was the prisoners' weight loss and their suffering during the wall-standing technique. *Id.*

77. *Id.* at 794 (noting that the five techniques had "a clear resemblance to those methods of systematic torture which have been known over the ages. . . . Although the five techniques . . . might not necessarily cause any severe after-effects, the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.").

78. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 67 (1978).

79. *Id.* at 65 (stating that determining whether abuse constitutes ill-treatment depends on "the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim").

80. *Id.* at 66 (emphasis added). In identifying the level of pain as the primary distinction between torture and ill-treatment, the court cited as support the General Assembly's Torture Declaration, which states that "[t]orture constitutes an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." *Id.* at 66-67. It should be noted, however, that in adopting this declaration, the General Assembly had relied on the Commission's discussion of torture and ill-treatment in *The Greek Case*. RODLEY, *supra* note 23, at 85.

inhuman treatment causing very serious and cruel suffering.”⁸¹

In applying these standards, the Court held that the five techniques did not inflict suffering sufficient to constitute torture.⁸² Like the European Commission, the European Court did not identify medical (or other) evidence to support its conclusion. The Court did not compare the medical aftermath of the prisoners subjected to the disorientation techniques with that suffered by survivors of other forms of torture. In addition, the Court did not identify what proof of pain or specific level of pain was necessary for a finding that the five techniques constituted torture.⁸³ The Court seemed to apply the Commission’s “we know it when we see it” test for distinguishing acts of torture from ill-treatment.

One dissenting judge criticized the majority for failing to identify torture in modern methods of abuse that have the same effects as traditional forms of torture. This judge stated that “[t]he Court’s interpretation . . . seems . . . to be directed to a conception of torture based on methods of inflicting suffering which have already been overtaken by the ingenuity of modern techniques of oppression.”⁸⁴ The focus on traditional methods of torture as the underlying standard by which other forms of abuse are measured mirrors the Commission’s implicit understanding of torture.⁸⁵

3. *Tyrer v. United Kingdom*

The European Court later defined degrading abuse in *Tyrer v. United Kingdom*.⁸⁶ In *Tyrer*, the issue was whether the birching of a teenager as punishment for an assault constituted degrading punishment.⁸⁷ Police birched the youth, whose name was not publicized, on his bare posterior in the presence of his father and a doctor.⁸⁸ The European Court held that for abuse to be degrading, it must cause a minimum level of humiliation or debasement.⁸⁹ Whether this level

81. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66 (1978).

82. *Id.* at 67.

83. The Court did state that the five techniques “caused, if not actual bodily injury, at least intense physical and mental suffering . . . and also led to acute psychiatric disturbances during interrogation.” *Id.* at 66. The Court, however, did not explain why such pain was not enough to be considered torture.

84. *Id.* at 137.

85. See *supra* note 77 and accompanying text.

86. 26 Eur. Ct. H.R. (ser. A) at 14-17 (1978).

87. *Id.* at 7, 14. The Court rejected the possibility that the birching could constitute inhuman punishment or torture because it did not inflict a severe enough level of suffering. *Id.* at 14-15. The Court only found that

[t]he birching raised, but did not cut, the applicant’s skin and he was sore for about a week and a half afterwards . . . [A]lthough the applicant did not suffer any severe or long-lasting physical effects[,] . . . it [cannot] be excluded that the punishment may have adverse psychological effects . . . [and] Mr. Tyrer was [also] subjected to the mental anguish of anticipating the violence he was to have inflicted on him.

Id. at 7, 16-17. Again, the Court did not reveal why the evidence showed that the level of pain inflicted was insufficient.

88. *Id.* at 7.

89. *Id.* at 15 (“The assessment [of whether abuse is degrading] is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the

is reached is a relative matter, and "it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others."⁹⁰ Applying this framework, the Court held that, given the circumstances of this birching, degrading punishment had been inflicted.⁹¹ Again, the Court failed to explain the evidence it had relied upon in determining that Tyrer suffered sufficient humiliation.

4. *Campbell v. United Kingdom*

The European Court further elaborated on its analysis of degrading abuse by holding in *Campbell v. United Kingdom*⁹² that the potential use of corporal punishment in Scottish public schools for disciplinary purposes was not degrading treatment.⁹³ In *Campbell*, the corporal punishment at issue involved the "striking the palm of the pupil with a leather strap" either in front of the class or in a separate room.⁹⁴ Because the children in the case had not yet been strapped, the Court held that they had not endured the level of pain or humiliation necessary for an Article 3 violation.⁹⁵

According to the Court, there existed no evidence that the children's mere apprehension of corporal punishment resulted in severe pain or humiliation.⁹⁶ Unlike its other decisions, the Court referred to the necessity of medical evidence, stating that "it has not been shown by means of medical certificates or otherwise that [the children] suffered any adverse psychological or other effects."⁹⁷ This analysis may be another example of the "we know it when we see it" test: when the Court does not view an abuse as an Article 3 violation, it cites a lack of medical evidence to support its finding; but when the Court identifies a violation, it does not require such medical or other evidence of suffering.

C. CONCLUSIONS

Two important observations can be made regarding the body of international agreements and European case law concerning torture and ill-treatment. First, there exists a legal distinction between torture and ill-treatment. For abuse to be either torture or ill-treatment, it must be inflicted with the involvement of a government and the pain inflicted must reach a minimum threshold of severity.

punishment itself and the manner and method of its execution. . . . [T]he Convention is a living instrument which . . . must be interpreted in the light of present-day conditions.").

90. *Id.* at 16.

91. *Id.* at 16-17.

92. 48 Eur. Ct. H.R. (ser. A) (1982).

93. *Id.* at 14.

94. *Id.* at 8.

95. *Id.* at 12-13. However, the Court did note that "a mere threat of conduct prohibited by Article 3 may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment.'" *Id.* at 12.

96. *Id.* at 13.

97. *Id.*

Torture is distinguished from ill-treatment because it: (1) inflicts more pain than ill-treatment and (2) is inflicted for a political purpose (i.e., to intimidate, to discriminate, to punish, or to extract a confession). The European Court has held that the level of pain inflicted is the more weighty factor in determining whether abuse constitutes torture or ill-treatment. Thus, even if abuse is inflicted for an illicit purpose, it will not be viewed as torture absent very severe suffering.

Second, adjudicative bodies may be inherently biased against determining that rape is torture. For example, both the European Commission and the European Court appear to employ a *de facto* "we know it when we see it" test to determine whether abuse constitutes torture or ill-treatment. Such unprincipled analysis relies on visceral impressions of primarily male decisionmakers. Skewed by these impressions, such a test ignores the very real pain experienced by female survivors of gender-specific abuses, thereby hindering the identification of rape as a means of torture.

Additionally, these two international tribunals appear less willing to view "nontraditional" forms of abuse as torture under international law. Such forms of abuse are compared to an unwritten list of bizarre, unique, and grotesque forms of traditional tortures, which were inflicted by governments and which were very different from the ordinary crimes committed by citizens. As a consequence, because rape is a prevalent "street crime," adjudicative bodies may refuse to identify rape as torture because of its "commonness." Such bodies may feel that rape does not carry the special stigma of torture because it is not a unique and bizarre abuse, but rather an ordinary crime. Such analysis, however, is flawed for two reasons. First, as a historical matter, rape should be included in the class of traditional forms of torture. Indeed, rape has been used as a method of governmental aggression for centuries.⁹⁸ Second, there exists no language in any of the international legal prohibitions against torture authorizing adjudicative bodies to employ different analyses between traditional and nontraditional methods of abuse or between uncommon and common ways of inflicting pain.

Instead of depending on visceral impressions and notions of traditional methods of torture, the legal status of rape should be determined by referring to the definition of torture under international law. Torture is the infliction of severe suffering for a political purpose by government officials. Therefore, if government officials rape for political purposes, those rapes should be classified as torture if they inflict severe pain. The determination of pain should be made by examining medical and other evidence of the pain endured by rape survivors.

98. See generally BROWNMILLER, *supra* note 3 (tracing use of rape throughout history as a political weapon and torture). An example of a method of medieval torture was a device "[s]haped like a pear, made of wood, but with metal attachments and pointed wood pieces set into it . . . [which] the torturer put . . . into a woman's vagina and gradually expanded it inside her body until it broke." PAGE DUBOIS, *TORTURE AND TRUTH* 2-3 (1990).

Part III of this note examines such evidence, compares it to evidence of the suffering endured by survivors of other forms of torture, and finds that rape inflicts the requisite level of pain inherent in the notion of torture.

III. THE LEVEL OF PAIN AND SUFFERING INFLICTED BY RAPE

To explore whether rape inflicts "severe pain or suffering" of the level inherent in torture, this Part focuses on two aspects of the suffering that rape survivors experience. The first Section examines the psychological sequelae of rape survivors and then compares them to the psychological distress endured by survivors of abuse that is widely recognized to constitute torture.⁹⁹ This comparison reveals that the suffering of rape survivors is strikingly similar in intensity and duration to the suffering endured by torture survivors. This Section therefore concludes that rape inflicts the requisite level of suffering to be classified as torture. The second Section explores how rape as a method of torture inflicts a unique sort of pain not experienced by survivors of other forms of torture and thus concludes that such rape constitutes not only torture, but "torture plus."

A. STUDIES ON THE AFTERMATH OF RAPE AND TORTURE

Until the 1970s, very few studies focused on the psychological aftermath of rape survivors.¹⁰⁰ Indeed, it was not until 1974 that researchers identified "rape trauma syndrome," a condition from which many rape survivors suffer.¹⁰¹ Later, the medical community came to view rape trauma syndrome not as a distinct syndrome, but rather as a manifestation of Post-Traumatic Stress Disorder ("PTSD").¹⁰² Subsequent studies reported that PTSD symptoms also characterize, to a great extent, the psychological distress experienced by torture survivors.¹⁰³ Such research reveals that rape inflicts a level of suffering comparable to that inflicted by other forms of torture.

99. Although rape and torture by other means may inflict physical trauma, this note focuses on the psychological effects of rape and torture because both forms of abuse result in serious mental suffering regardless of the presence of physical scars. See Dorothy J. Hicks, *Rape: Sexual Assault*, 7 OBSTET. & GYN. ANN. 447, 452-55 (1978) (reporting aftermath of rape is rarely physical, but usually psychic trauma). Many forms of torture are designed not to leave any physical traces, but rather to change the mental balance of individuals. See Hans D. Peterson & Peter Jacobson, *Psychical and Physical Symptoms After Torture*, 29 FORENSIC SCI. INT'L 179, 189 (1985) ("Torture victims of today are unlikely to present physical stigmata but can . . . be expected to reveal numerous symptoms mostly of a psychological nature."); Rosalind Ramsay et al., *Psychiatric Morbidity in Survivors of Organised State Violence Including Torture*, 162 BRIT. J. PSYCHIATRY, 55, 55 (1993) ("The purpose of torture is always to achieve a psychological change in individuals . . .").

100. Burgess & Holmstrom, *supra* note 37, at 981.

101. *Id.* at 982. This syndrome is defined as "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation." *Id.*

102. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 248 (3d ed. 1987) [hereinafter DSM-III].

103. See *infra* notes 138-148 and accompanying text.

1. The Aftermath of Rape

In a 1974 study,¹⁰⁴ researchers identified two distinct phases of rape trauma syndrome.¹⁰⁵ In the first phase, the acute phase, rape survivors underwent a two- to three-week period of serious disorganization in their lives, during which they experienced several somatic and emotional reactions.¹⁰⁶ First, the survivors showed signs of physical injury from their attacks.¹⁰⁷ Second, the survivors suffered from skeletal muscle tension that caused them to be startled very easily and to experience sleep problems, fatigue, and headaches.¹⁰⁸ Third, the women suffered from gastrointestinal irritability that changed their appetites and resulted in stomach problems.¹⁰⁹ The major emotional reactions observed by the researchers were "fear, humiliation, . . . embarrassment, . . . anger, revenge, and self-blame."¹¹⁰ According to the study's authors, "[f]ear of physical violence and death was the primary feeling described. Victims stated it was not the rape that was so upsetting as much as the feeling that they would be killed"¹¹¹

The second phase of rape trauma syndrome was characterized as a period of reorganization, in which the rape survivors experienced a change in motor activity, nightmares, and traumatophobia.¹¹² Survivors often changed their resi-

104. This study focused on 92 adult women of various ethnic backgrounds who were treated for "forcible rape" at the Boston City Hospital. Burgess & Holmstrom, *supra* note 37, at 981. In general, the medical studies on the psychological sequelae of rape focus on women living in Western countries who were raped during times of peace. However, the aftermath experienced by rape survivors might vary according to their cultural backgrounds. Shana Swiss, *Rape as a Crime of War*, 270 JAMA 612, 614 (1993). Additionally, survivors may not necessarily "voice their distress in 'psychological' terms." *Id.* For example, a study of Ugandan women who had been raped during war reported that most of the survivors exhibited physical symptoms (such as headaches, rashes, and vaginal discharge) rather than psychological symptoms. *Id.*

105. Burgess & Holmstrom, *supra* note 37, at 982.

106. *Id.*

107. This trauma "included general soreness and bruising from the physical attack in various parts of the body such as the throat, neck, breasts, thighs, legs and arms." *Id.* Other physical symptoms were "vaginal discharge, itching, a burning sensation on urination, and generalized pain A number of women developed chronic vaginal infections following the rape." *Id.* at 982-83.

108. *Id.*

109. *Id.*

110. *Id.* at 983.

111. *Id.* A British study also found that

[a]ll the rape victims felt, at some point, that they were going to be killed and their common reaction was to try and avoid this at all costs. . . . Almost all of them experienced fear and panic, feeling that they were completely powerless The other feelings described by the rape victim included depersonalisation and derealisation and somatic symptoms including nausea, dizziness and faintness.

Gillian C. Mezey & Pamela J. Taylor, *Psychological Reactions of Women Who Have Been Raped: A Descriptive and Comparative Study*, 152 BRIT. J. PSYCHIATRY 330, 333 (1988). See also Carol C. Nadelson et al., *A Follow-Up Study of Rape Victims*, 139 AM. J. PSYCHIATRY 1266, 1267 (1982) (reporting that approximately half of rape survivors in study felt "terror, horror, fear, and/or fright" that they were going to be killed during their attack).

112. Burgess & Holmstrom, *supra* note 37, at 983-84. Traumatophobia is a phobia developed "as a defensive reaction to the circumstances" of a particular trauma such as rape. *Id.* at 984.

dences¹¹³ or phone numbers and made special efforts to bond with family members or friends for support.¹¹⁴ Some survivors also experienced recurrent dreams: at first they had nightmares that the rapists were attacking them and then they dreamt of protecting themselves from their assailants.¹¹⁵ Survivors who exhibited traumatophobia developed fears specific to their rape experiences. For example, if the rapes occurred while the survivors were alone, they developed specific fears of being alone.¹¹⁶

Subsequent studies documented the experiences of rape survivors during this reorganization phase. For example, one study found that three months after their rapes, survivors continued to show high levels of "interpersonal sensitivity, anxiety, phobic anxiety, paranoid ideation, and psychoticism."¹¹⁷ This study found that between three and six months after their rapes, the survivors' levels of fear and anxiety had stabilized at a point higher than that of women who had not been raped.¹¹⁸ Another study, which examined the effects of rape on survivors at least one year after their rapes, found that survivors exhibited higher levels of depression and derived less enjoyment and satisfaction from life than women who had not been raped.¹¹⁹ Half of the survivors stated they had

113. *Id.* at 983. About one half of the women in the study changed their residences during this period. *Id.* According to the researchers, "[t]here was . . . a strong need to get away, and some women took trips to other states or countries." *Id.*

114. *Id.*

115. *Id.* at 984.

116. *Id.* Other studies have confirmed the presence of such symptoms in rape survivors after the acute phase. See, e.g., Mezey & Taylor, *supra* note 111, at 335 (reporting that "[m]any women went on experiencing flashbacks and nightmares for at least a month [after their rapes.] . . . [T]hey were less able to tolerate anger, for example, in arguments with a spouse or even when seeing violence on the TV [N]one of the women had been able to go out of the house after dark by themselves for up to 4 weeks after the attack"); Nadelson et al., *supra* note 111, at 1268 (finding that 15 to 30 months after their rapes, survivors "experienced intrusive thoughts, sleep disturbances, [and] increased emotional susceptibility").

117. Dean G. Kilpatrick et al., *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658, 664 (1979) (emphasis omitted). During the weeks following their rapes, rape survivors typically experienced "feelings of degradation and devastation, loss of self-esteem, frustration, indignation, nervousness, pervasive anxiety or anxiety attacks, depression, sleep disturbances, lack of concentration, recurring and intrusive thoughts, and a sense of unreality and depersonalization." Nadelson et al., *supra* note 111, at 1268.

118. Kilpatrick et al., *supra* note 117, at 664-65. Similarly, in interviews conducted one to two and a half years after the rapes occurred, researchers found that

[t]he most common symptom reported [by rape survivors] as still present . . . was a pervasive suspiciousness of others. Almost all of the women were troubled by continued feelings of fear and distrust of others. More than half reported that they felt restricted and would venture out only with friends. A few noted that they feared walking alone even in daylight.

Nadelson et al., *supra* note 111, at 1268. One rape survivor explained that after her rape, "I felt endangered everywhere. Every noise startled me. Every leaf was camouflage for an assassin." Metzger, *supra* note 38, at 406.

119. Elizabeth M. Ellis et al., *An Assessment of Long-Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOL. 263, 264 (1981); see also Beverly M. Atkeson et al., *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. CONSULTING & CLINICAL PSYCHOL. 96, 100 (1982) (concluding that, in a

considered suicide.¹²⁰

Recovering from these numerous symptoms can take months or years. One study found that thirty-seven percent of survivors felt that they had recovered within several months of the assault while another thirty-seven percent felt that they had recovered only after several years.¹²¹ The remaining twenty-six percent felt that they still had not recovered four to six years after their rapes.¹²² Although many medical studies have tried to identify factors that account for more severe reactions in survivors, most studies have shown conflicting results.¹²³ However, many studies agree that a lack of social support can worsen the survivors' postrape experiences.¹²⁴

study of rape survivors one year after their assaults, rate of depressive symptoms among survivors is "significantly greater" than among nonvictims); Solveig Dahl, *Acute Response to Rape—a PTSD Variant*, 80 ACTA PSYCHIATRICA SCANDINAVICA 56, 58 (1989) (observing that majority of rape survivors experienced depressive symptoms in first two weeks after assault); Mezey & Taylor, *supra* note 111, at 334-35 (finding that one month after their assaults, significant numbers of rape survivors experienced guilt, self-blame, and lowered self-esteem, and noting high levels of severe and moderate depression); Nadelson et al., *supra* note 111, at 1268 (reporting that, in a study conducted one to two and a half years after the rapes, 41% of the survivors "stated that they experienced depressive feelings related to the rape, some experienced continuous sadness and others noted intermittent episodes of severe depression").

120. Ellis et al., *supra* note 119, at 264; *see also* Ann W. Burgess & Lynda L. Holmstrom, *Adaptive Strategies and Recovery from Rape*, 136 AM. J. PSYCHIATRY 1278, 1281 (1979) (finding that 11% of rape survivors had attempted suicide); Dahl, *supra* note 119, at 59 (noting that 34% of survivors of rape and attempted rape had "suicidal thoughts within a moderate intensity range, 29% at a high intensity range"); Patricia Frazier & Eugene Borgida, *Rape Trauma Syndrome Evidence in Court*, 40 AM. PSYCHOLOGIST 984, 990 (1985) (reporting on a study that found survivors of sexual assault were five times more likely than those who had not been assaulted to attempt suicide).

121. Burgess & Holmstrom, *supra* note 120, at 1278.

122. *Id.* In a study of rape survivors two to 46 years after their rapes, researchers found that the survivors still exhibited higher levels of anxiety and fearfulness than did women who had not been raped. *See* Jose M. Santiago et al., *Long-Term Psychological Effects of Rape in 35 Rape Victims*, 142 AM. J. PSYCHIATRY 1338, 1339 (1985). *But see* Mezey & Taylor, *supra* note 111, at 337 (noting that in their study of 12 rape survivors, "the level of acute distress had resolved for most people by about 4 months after their attack [but] longer-term follow-up is needed").

123. There does not appear to be a medical consensus regarding whether a rape survivor's personal history and the circumstances of the rape significantly influence her psychological sequelae. *Compare* I.T. Bownes et al., *Assault Characteristics and Posttraumatic Stress Disorder in Rape Victims*, 83 ACTA PSYCHIATRICA SCANDINAVICA 27, 29 (1991) (finding link between circumstances of assault and aftermath for survivor); Ellis et al., *supra* note 119, at 264-66 (finding that survivors of violent, stranger rapes were more likely to suffer from depression and phobic problems than survivors of acquaintance rapes) *and* Santiago et al., *supra* note 122, at 1340 (finding that being prior survivor of sexual assault resulted in higher level of depression and anxiety in survivor) *with* Ellen Frank & Barbara P. Anderson, *Psychiatric Disorders in Rape Victims: Past History and Current Symptomatology*, 28 COMPREHENSIVE PSYCHIATRY 77, 81 (1987) (finding that circumstances of rape and a survivor's prior history of sexual assault do not impact significantly on severity of aftermath of rape survivor).

124. *See, e.g.,* Burgess & Holmstrom, *supra* note 120, at 1282 (finding that "[v]ictims with partnership stability had a faster recovery than victims who did not have partnership stability"); Frank & Anderson, *supra* note 123, at 77 (observing that "an inadequate or nonsupportive social network . . . [appears] to exacerbate the symptoms a victim experiences and impede[s] the pace of recovery from rape"); Mezey & Taylor, *supra* note 111, at 336 (reporting that "[t]he way in which an assault, and in particular a sexual assault, was interpreted by the police, the victim's family and advisers, did . . . seem to have an important impact, in terms of reinforcing the woman's sense of guilt, shame, and self-blame").

In 1987, the American Psychiatric Association ("APA") determined that rape trauma syndrome was a manifestation of PTSD and was better identified as such rather than as a separate syndrome.¹²⁵ PTSD is an anxiety disorder resulting from direct exposure to an "extreme traumatic stressor."¹²⁶ The basic theory underlying the concept of PTSD is that such traumas are processed through one "psychophysiological pathway."¹²⁷ Most researchers agree with the APA's classification of rape trauma syndrome as a manifestation of PTSD.¹²⁸

To qualify as PTSD, a disorder must meet six criteria. First, an individual must react with fear or horror after being exposed personally to an extremely stressful event "that involve[d] actual or threatened death or serious injury, or . . . a threat to the physical integrity of self or others."¹²⁹ Second, the survivor must consistently "re-experience" this event in one of several ways (such as recurrent thoughts, dreams, or feelings relating to the trauma).¹³⁰ Third, the survivor must persistently avoid the "stimuli associated with the trauma" or display a "numbing of general responsiveness."¹³¹ Specifically, a survivor must exhibit at least three methods of avoiding or numbing of her feelings, thoughts, or skills.¹³² Fourth, an individual with PTSD must exhibit, in at least two ways,

One factor, however, that has not been greatly researched is the impact of the "psychodynamically complex" relationship between the rapist and the survivor on the survivor's aftermath. *See* Bownes et al., *supra* note 123, at 29. Bownes suggests that rape is not merely a "life-threatening experience," but an intentional act in which the rapist's motivations may affect the survivor's reactions. *Id.* Further medical exploration of this theory regarding the relationship between the rapist and the survivor could be very useful in understanding the aftermath experienced by rape survivors.

125. DSM-III, *supra* note 102, at 248.

126. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DSM-IV]. For a discussion of the acceptance of PTSD as a "coherent syndrome with regard to internal consistency of the diagnostic criteria," see Richard J. McNally, *Psychopathology of Post-Traumatic Stress Disorder (PTSD): Boundaries of the Syndrome*, in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 229, 232-35 (Metin Bosaglu ed., 1992) [hereinafter TORTURE AND ITS CONSEQUENCES].

127. Finn Somnier et al., *Psychosocial Consequences of Torture: Current Knowledge and Evidence*, in TORTURE AND ITS CONSEQUENCES, *supra* note 126, at 56, 57.

128. *See, e.g.*, Bownes et al., *supra* note 123, at 27-28 (noting that "physical, cognitive and behavioural responses that typically follow rape are consistent with [the] . . . criteria for posttraumatic stress disorder" and diagnosing 70% of studies' rape survivors with PTSD); Frank & Anderson, *supra* note 123, at 81 (reporting that approximately 70% of rape survivors suffer from PTSD, and survivors typically also meet anxiety and depression criteria); Mezey & Taylor, *supra* note 111, at 330 (explaining that "rape trauma syndrome is probably best construed as a form of the post-traumatic stress syndrome"); Nadelson et al., *supra* note 111, at 1269 (finding that symptoms of rape survivors "are consistent with the diagnosis of posttraumatic stress disorder"); *see also* Dahl, *supra* note 119, at 59 (reporting that most rape survivors exhibited PTSD symptoms within two weeks following rapes).

129. DSM-IV, *supra* note 126, at 427-28. Traumatic episodes include "military combat, violent personal assault . . . , terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, [or] natural or manmade disasters. *The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape).*" *Id.* at 424 (emphasis added).

130. *Id.* at 428.

131. *Id.*

132. The criteria for meeting this requirement are:

- (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma[;]
- (2) efforts to avoid activities, places, or people that arouse recollections of the trauma[;]

symptoms of "increased arousal," such as hypervigilance, irritability, difficulty concentrating or sleeping, or exaggerated startle responses.¹³³ Fifth, the above symptoms must last at least one month.¹³⁴ Sixth, these symptoms must cause "significant distress or impairment in . . . functioning."¹³⁵

2. The Aftermath of Torture

The examination of the psychological sequelae of torture survivors is a relatively new field of study.¹³⁶ In early studies, researchers believed that they had discovered the existence of a "torture syndrome."¹³⁷ However, the medical community later came to view the symptoms of torture survivors as constituting a response akin to PTSD rather than a unique syndrome.¹³⁸ In fact, in an overview of the literature on the aftermath of torture survivors, a researcher concluded that "the most common psychological disorders observed in survivors of torture are depression and PTSD."¹³⁹

Studies have confirmed that PTSD is a main component of the torture aftermath. For example, in a study of the aftermath experienced by torture survivors,¹⁴⁰ researchers reported that thirty-three percent of the torture survi-

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- (3) inability to recall an important aspect of the trauma[;]
 - (4) markedly diminished interest or participation in significant activities[;]
 - (5) feeling of detachment or estrangement from others[;]
 - (6) restricted range of affect (e.g. unable to have loving feelings)[; and]
 - (7) sense of foreshortened future (e.g. does not expect to have a career, marriage, children, or a normal life span)[.]

Id.

133. *Id.*

134. *Id.* at 429.

135. *Id.* This sixth criterion for diagnosis was added to the definition of PTSD in DSM-IV. *Id.* at 783. Most of the rape and torture studies cited in this note were conducted before the inclusion of this criterion and therefore most likely did not use it to identify cases of PTSD.

136. See Anne E. Goldfeld et al., *The Physical and Psychological Sequelae of Torture: Symptomatology and Diagnosis*, 259 JAMA 2725, 2725 (1988) (stating that, as of 1988, information about the aftermath of torture was scarce); Evin Kantemir, *Studying Torture Survivors*, 272 JAMA 400, 400 (1994) (explaining that "information on the effects of torture is still inadequate, partly because of problems inherent in the study of this politically sensitive subject").

137. McNally, *supra* note 126, at 245.

138. Richard F. Mollica & Yael Caspi-Yavin, *Overview: The Assessment and Diagnosis of Torture Events and Symptoms*, in TORTURE AND ITS CONSEQUENCES, *supra* note 126, at 253, 262; see Otto Doerr-Zegers et al., *Torture: Psychiatric Sequelae and Phenomenology*, 55 PSYCHIATRY 177, 178 (1992) (explaining that "international experience . . . has demonstrated the regular development of a clinical picture immediately following torture, which corresponds to . . . 'acute posttraumatic stress disorder'"); X. Fornazzari & M. Freire, *Women as Victims of Torture*, 82 ACTA PSYCHIATRICA SCANDINAVICA 257, 257 (1990) (stating that "[m]ost [torture] patients meet all the criteria for the diagnosis of posttraumatic stress disorder").

139. Kantemir, *supra* note 136, at 400.

140. This study focused on the aftermath experienced by 55 torture survivors who were political activists in Turkey and used a control group comprised of political activists who had not been tortured. Metin Basoglu et al., *Psychological Effects of Torture: A Comparison of Tortured With Nontortured Political Activists in Turkey*, 151 AM. J. PSYCHIATRY 76, 78 (1994) [hereinafter Basoglu et al., *Psychological Effects*]. The torture survivors in this study were subjected to various forms of torture

vors suffered from PTSD after their torture, whereas only eleven percent of the control group were diagnosed with PTSD.¹⁴¹ Months later, eighteen percent of the torture survivors still suffered from moderately severe PTSD, while only four percent of the control group suffered from PTSD.¹⁴² Also, at that time, two of the torture survivors suffered from depression, but no one in the control group was diagnosed with depression.¹⁴³ Ultimately, the researchers concluded that the

PTSD symptoms were the strongest discriminators between the tortured and nontortured groups [T]he "core" PTSD symptoms (nightmares, flashbacks, distress when reminded of the trauma, avoidance of trauma-related thoughts, activities, or situations, and physiological reactivity to reminders of trauma) observed in our study group reflect the direct conditioning effects of torture.¹⁴⁴

Other studies have confirmed the finding of PTSD as a main sequela of torture.¹⁴⁵ For example, in a study of Norwegian seamen who were tortured by

including beatings and being pulled by their hair, exposed to extremes in cold or heat, hit on the ears, told they would be executed, hung by their wrists, or having needles placed under their toenails or fingernails. *Id.* at 79. This study is unique among torture studies in two ways. First, because it compared the mental health of tortured political activists with that of similarly situated political activists who had not been tortured, the study isolated the effects of torture from the effects of general persecution on political activists. Second, because the torture survivors were examined in the country in which the torture had occurred, the study was able to isolate the psychological effects of torture from other effects typically observed in refugees. *Id.*

141. *Id.* at 79. The researchers felt that the level of PTSD they found was unexpectedly low given the severity of the torture experienced by the survivors. *Id.* The researchers hypothesized that this observation resulted from participants' self-selection, their strong commitment to their political causes, and their strong post-torture, social support systems. *Id.* at 81. Also, the torture survivors "had prior knowledge of what torture involved and most were psychologically prepared for it. Furthermore, prior exposures to other related stressors in political struggle may have immunized them against the traumatic effects of torture." Metin Basoglu, *Factors Related to Long-Term Traumatic Stress Responses in Survivors of Torture in Turkey*, 272 JAMA 357, 361-62 (1994) [hereinafter Basoglu, *Factors*] (finding that survivors' perceived severity of torture and "effect of trauma on family" were important predictors of occurrence of PTSD in torture survivors).

142. Basoglu et al., *Psychological Effects*, *supra* note 140, at 79.

143. *Id.*

144. Basoglu, *Factors*, *supra* note 141, at 361.

145. In a study of 28 Turkish refugees living in exile in Denmark, 14 of whom claimed to have been tortured, researchers found that those allegedly tortured had higher levels of PTSD symptoms than the nontortured. See Hans P. Hougen, *Sequelae to Torture: A Controlled Study of Torture Victims Living in Exile*, 36 FORENSIC SCI. INT'L 153, 157 (1988). The types of torture reported by the participants in this study included beatings, asphyxiation, solitary confinement, and mock executions. *Id.* at 156.

Another study found that the two most common psychological problems of torture survivors were PTSD and depression. See Ramsay et al., *supra* note 99, at 58. The study focused on the aftermath experienced by 100 torture survivors from several continents who had suffered various forms of torture, including threats to themselves or others, suspension, viewing or hearing the torture of others, and electric shock or burning. *Id.* at 56. The study noted that survivors of different types of torture experienced different levels of various PTSD symptoms. *Id.* at 57. For example, survivors of isolation,

Libyans, researchers found that, six months after their release, fifty-four percent of the crew suffered from PTSD.¹⁴⁶ Similarly, a study that focused on female torture survivors found that their psychological aftermath is “consistent with those described in the literature for torture victims in general, mainly anxiety and affective-type symptoms, plus symptoms that match those of the current diagnostic criteria for post-traumatic stress disorder.”¹⁴⁷

Although numerous studies have identified PTSD as a recurrent diagnosis in torture survivors, the association of the aftermath of torture with PTSD is still a matter of some controversy for several reasons. First, some researchers have observed that certain PTSD symptoms such as “survival guilt” and “psychic numbing” may be irrelevant to the torture survivor’s experience.¹⁴⁸ Second, others believe that the method of torture employed can produce specific and differing responses in the survivors.¹⁴⁹ Third, because PTSD was developed by studies in Western countries, a few researchers question whether it is applicable to torture survivors in non-Western countries.¹⁵⁰ Nonetheless, the current research continues to identify PTSD as a distinguishing feature of the psychological aftermath experienced by torture survivors.

physical impact, and blindfolding experienced higher levels of intrusion symptoms. *Id.* Survivors of sexual violence experienced higher levels of avoidance symptoms. *Id.*

A third study examined 52 Indochinese refugees living in the United States after experiencing numerous traumas including torture. See Richard F. Mollica et al., *The Psychological Impact of War Trauma and Torture on Southeast Asian Refugees*, 144 AM. J. PSYCHIATRY 1567 (1987). These researchers found that 50% of the participants suffered from PTSD and 71% suffered from a major affective disorder. *Id.* at 1569. Most who suffered from PTSD also suffered from another disorder. *Id.* at 1571. Those who did not suffer from PTSD still exhibited PTSD symptoms such as nightmares. *Id.* at 1570.

The three studies described in this footnote examined torture survivors who were also refugees. Thus, these studies did not isolate the effects of torture from those caused by being a refugee.

146. Lars Weisaeth, *Torture of a Norwegian Ship’s Crew*, 80 ACTA PSYCHIATRICA SCANDINAVICA 63, 68 (1989). The crew members were subjected to several forms of torture including beatings and threats of future torture. *Id.* at 65-66.

147. Fornazzari & Freire, *supra* note 138, at 259. In this study, researchers examined 36 refugee women from Latin America. *Id.* at 257. Of these women, 23 had been directly subjected to both physical and psychological torture, and 13 had been subjected to verbal abuse, death threats, or had their houses searched. *Id.* at 258. The methods of torture included “beatings with hands, fists or kicks, or with wet clothes on naked bodies[,]” hanging from the wrists, isolation, and threats of future harm. *Id.* The study found that the tortured women in the first group experienced feelings of “guilt, poor self-esteem, concentration difficulties, mistrust, fears of rejection and memory difficulties” more frequently than the women in the second group. *Id.* at 258-59. Also, 56% of the women in the first group suffered from vague suicidal ideation, whereas only 23% of the women in the second group had such feelings. *Id.* at 259. Women in the first group who had been sexually assaulted felt “anguish, anxiety; sadness, tearfulness, poor self-esteem; guilt, mistrust; irritability; insomnia, nightmares; . . . fear of being alone, of rejection and of persecution.” *Id.* One year following the initial examination, twice as many women in the second group achieved near complete recovery as in the first group. *Id.*

148. Mollica & Caspi-Yavin, *supra* note 138, at 263.

149. *Id.*; see also Ramsay et al., *supra* note 99, at 59.

150. Mollica & Caspi-Yavin, *supra* note 138, at 265 (explaining that “[w]hat constitutes a ‘disease’ entity in one culture is not necessarily viewed as a disease in another. . . . [However,] [a] culture bound syndrome or folk illness with traditionally defined symptoms and folk treatments for trauma or torture-induced illnesses have not been demonstrated.”).

3. Conclusions

The psychological aftermaths of rape and torture are strikingly similar. Indeed, rape survivors endure suffering comparable to that endured by torture survivors. Both torture and rape survivors experience extremely high levels of anxiety after their assaults. Studies have shown that both types of survivors often experience PTSD as well as depression. Given such empirical evidence, it is not surprising that medical researchers have consistently viewed sexual violence as a form of torture.¹⁵¹

Medically informed judgements should drive the determination of whether rape constitutes torture. As such, international tribunals and organizations should find that, when the government is involved in raping a woman for political purposes, such rape inflicts severe suffering and is a form of torture.¹⁵² Rape should only fail to qualify as torture, therefore, when the government is not involved in the rape and/or the rapist had no political purpose.

B. UNIQUE DIMENSIONS OF RAPE AS A METHOD OF TORTURE

When forcible sex is the torturer's weapon, survivors of such rapes may experience a level of isolation that is unique among torture survivors. For instance, unlike survivors of other forms of torture, rape survivors often are excluded from their communities because they are viewed as defiled by their torturers. Also, rape survivors can experience isolation in their more intimate relationships because sex, once a symbol of unity, has been transformed into a weapon of aggression. Thus, when government officials use rape for political purposes, the suffering inflicted exceeds that inherent in torture because of the resulting isolation felt by the survivor, thereby inflicting "torture plus."

1. Isolation from the Community

Because of the stigma associated with being a raped woman, a survivor may experience isolation from her community. In some cultures, a rape survivor is

151. See, e.g., Basoglu et al., *Psychological Effects*, *supra* note 140, at 79 (listing rape as well as threat of rape as forms of torture); Fornazzari & Freire, *supra* note 138, at 258 (citing rape as common form of torture); Hans P. Hougen, *Physical and Psychological Sequelae to Torture. A Controlled Clinical Study of Exiled Asylum Applicants*, 39 FORENSIC SCI. INT'L 5, 7 (1988) (reporting "sexual violations" as a form of torture); Richard F. Mollica & Linda Son, *Cultural Dimensions in the Evaluation and Treatment of Sexual Trauma*, 12 PSYCHIATRIC CLINICS N. AM. 363, 364 (1989) (explaining that sexual abuse is commonly used to torture women and forms of sexual torture include "both heterosexual and homosexual rape, rape of a woman by the use of specially trained dogs . . . [, and] insertion of a penis-shaped object into body openings"); Ramsay et al., *supra* note 99, at 56 ("Sexual torture . . . included injury or shocks to genital areas as well as more direct sexual assault or rape, and anal insertion of batons.").

152. The author notes that there is no principled reason for international tribunals to require a showing of PTSD or depression in individual cases of rape when such a showing is not required in individual cases of traditionally recognized forms of torture. To require rape survivors and not other torture survivors to prove severe suffering would amount to discrimination against rape survivors under international law.

considered to be contaminated and is formally banished from her community.¹⁵³ In Bangladesh, for example, a recently married young woman was expelled from her village and forced to live in a shelter for rape survivors when she was raped by six Pakistani soldiers in front of her husband.¹⁵⁴ Similarly, in Haiti, survivors of rape by government officials are often excluded by their communities and even their families.¹⁵⁵ In one such case,

Marie, a woman in her fifties, a democratic activist and well-known supporter of President Aristide, was attacked in her home by seven or eight armed men dressed in military uniforms. They beat her son and daughter who were present and forced her son to rape her in front of them and her daughter. The men then gang-raped both Marie and her daughter.

Marie feels that she has lost her family. Neither her son, who was forced to rape her, nor her daughter, who was present during the attack, can bear to look at her. She states, "My family is full of shame. We are dead."¹⁵⁶

In other cultures, rape survivors may be treated as defiled in other, less obvious ways.¹⁵⁷ In the United States, for example, rape survivors often feel

153. RAPE AND SEXUAL ABUSE, *supra* note 3, at 6 (reporting that in some societies "raped women are thought to be tainted or defiled, and the economic and social pressures to conceal a rape can be considerable: if a married woman is raped, her husband can exercise his right to desert her; a single woman who has been raped may no longer be seen as fit for marriage"); WOMEN IN THE FRONT LINE, *supra* note 3, at 3 (finding that "[c]ultural or social circumstances sometimes render women *particularly isolated* by the human rights violations they experience. They may choose not to report humiliating assaults by government agents because they fear this will result in reprisals from their own families, traumatic social repercussions, or further attacks by government officials." (emphasis added)).

Medical researchers have also highlighted the social problems faced by survivors of torture by means of rape. See Goldfeld et al., *supra* note 136, at 2728 ("[T]he true magnitude of [sexual violence as a form of torture] is likely to be underappreciated because women who have been sexually violated during torture frequently hide their experience from physicians and families to avoid the *shame and stigma* of the experience." (emphasis added)).

154. See BROWNMILLER, *supra* note 3, at 80-82.

155. *Haitian Communication*, *supra* note 8, at 26. Under Haitian law, rape is a crime against morals rather than against a survivor's mental and physical integrity. This focus on morals rather than on the assault attaches a special stigma to rape that is not associated with other forms of assault. *Id.* at 26 n.89.

156. *Id.* at 2 (quoting Mary Healy, Director, Washington Office on Haiti). As one rape survivor describes, "the [rape] victim is isolated or isolates herself; she enters a psychic quarantine as if she were contaminated, diseased, [or] scarred." Metzger, *supra* note 38, at 407.

157. For example, one rape survivor and legal scholar in the United States recounts that after her rape,

[m]any people, men and women, were kind, but many men I knew could not handle the rape at all. Subtle messages of blame, denial—believe it or not—*prurience*, snuck through. None of the nice, middle- and upper-middle class males I knew had apparently given rape much thought; certainly the man I was dating had not. Three weeks after the assault, and only one week after the cast was taken off my nose, he said irritably, "Why are you still so angry?"

Lyne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 222-23 (1987-88) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)). In another case, one rape survivor informed medical researchers:

My boyfriend thought [the rape] might give me a negative feeling to sex and he wanted to be

excluded and revictimized by a criminal justice system that treats them as the offenders.¹⁵⁸ As one survivor who testified against her rapist explained,

It felt like he [the defense attorney] was trying to get the jury to believe I had done something wrong, like I was the one on trial. He kept talking about how I wear shorts when I water my lawn—like I was a prostitute and sending out invitations I felt so demeaned I broke down and cried.¹⁵⁹

Survivors of other forms of torture generally are not excluded from their communities because of the method of their torture. Thus, the isolation and rejection experienced by rape survivors represents a dimension of pain *unique* to rape as a form of torture. Not only is such alienation an *additional* and *foreseeable* form of suffering, but it also greatly hinders rape survivors' psychological recovery.¹⁶⁰

2. Isolation in Intimate Relationships

When the torturer's weapon is forcible sex, rape survivors may also experience isolation in their intimate relationships. Rape transforms an "act that physically and symbolically indicates communion . . . into combat. . . . Rape asserts only combat, brutalizing the communal aspect of sexuality, destroying meaning, relationship, and person"¹⁶¹ Many rape survivors are "unable to resume a normal sexual style" during the weeks after their rapes.¹⁶² More specifically, in one study, researchers discovered that more than two-thirds of

sure it didn't. That night as soon as we were back to the apartment he wanted to make love. I didn't want sex, especially that night. . . . He also admitted he wanted to know if he could make love to me or if he would be *repulsed* by me and unable to [do so].

Burgess & Holmstrom, *supra* note 37, at 984 (emphasis added).

158. See generally MADIGAN & GAMBLE, *supra* note 24.

159. *Id.* at 102-03. In explaining her rape, one law professor recounts that when she called to report the rape,

the dispatcher asked, "are you sure it was rape?" "Look, it was a righteous 261. There was penetration." What else was I supposed to say? To this day, I hope that dispatcher caught "hell" for her incredible insensitivity.

Henderson, *supra* note 157, at 193, 221. Indeed, "[a]lthough today women do not automatically lose their social and economic value through rape, they are devalued through accusations of seduction. The woman is suspect while the man is protected." Metzger, *supra* note 38, at 407.

160. See Basoglu et al., *Psychological Effects*, *supra* note 140, at 81 (reporting that "less spous[al] support during and after imprisonment and the survivor's perception of torture events as more highly stressful were [factors] related to a greater number of subsequent PTSD symptoms"); Burgess & Holmstrom, *supra* note 120, at 1282 (finding that partnership stability led to faster recovery for rape survivors); Frank & Anderson, *supra* note 123, at 77 (noting that lack of a community support system can "exacerbate the symptoms a [rape] victim experiences"). In the words of one rape survivor, "[m]y experience and that of the women I know tells [sic] me there is no treatment for rape other than community The social community is the appropriate center for the restoration of spirit, but the rape victim is usually shamed into silence and or self-imposed isolation." Metzger, *supra* note 38, at 406.

161. Metzger, *supra* note 38, at 405.

162. Burgess & Holmstrom, *supra* note 37, at 984.

the survivors (who were sexually active before their rapes) were less sexually active after the rapes.¹⁶³ Almost forty percent of the survivors had not engaged in sex in the six months after their rapes, while one-third reduced the frequency of sex.¹⁶⁴ Of the survivors who were sexually active after their rapes, over half experienced flashbacks to their rapes during sex.¹⁶⁵ Some survivors also refused to engage in the particular sexual acts that they were forced to perform during their rapes.¹⁶⁶ About forty percent reported difficulty experiencing sexual feeling or orgasm.¹⁶⁷ And twenty-five percent of the sexually active women complained of physical pain when having sex.¹⁶⁸

Unlike other forms of torture, rape transforms an act that once symbolized unity and pleasure with another human into an act of combat. Rape survivors also may relive their torture during future sexual contacts. Survivors of other forms of torture—such as *falanga*—never felt that the acts of their torture symbolized unity with loved ones and do not have to repeat these acts in future relationships. Rape survivors not only experience severe suffering of the level inherent in torture, but also experience isolation from their communities and distortion in their intimate relationships, two unique aspects of rape as a form of torture. Thus, when forcible sex is used by government officials for political purposes, such acts inflict not only torture, but “torture plus.” This additional pain inflicted on rape survivors should be taken into account by the tribunals that determine the survivors’ compensation and the torturers’ punishment.

163. Ann W. Burgess & Lynda L. Holmstrom, *Rape: Sexual Disruption and Recovery*, 49 AM. J. ORTHOPSYCHIATRY 648, 651 (1979). In another study, a rape survivor reported five months after her rape that “[t]here are times I get hysterical with my boyfriend. I don’t want him near me; I get panicked. Sex is OK, but I still feel like screaming.” Burgess & Holmstrom, *supra* note 37, at 984. Other researchers have found that, after one to two and a half years after being raped, over half of the survivors reported sexual difficulties and a quarter avoided sex altogether, saying things such as “The thought of sex makes me sick . . . I’ve lost my desire . . . I haven’t been able to get close to anyone . . .” Nadelson et al., *supra* note 111, at 1268. See also Judith V. Becker et al., *Incidence and Types of Sexual Dysfunctions in Rape and Incest Victims*, 8 J. SEX & MARITAL THERAPY 65, 73 (1982) (reporting that most sexual disruptions after rape are fear of sex and dysfunctions of arousal and desire); Shirley Feldman-Summers et al., *The Impact of Rape on Sexual Satisfaction*, 88 J. ABNORMAL PSYCHOL. 101, 104 (1979) (finding that rape survivors experienced substantially less sexual satisfaction than control group of similarly situated women who had not been raped); Mezey & Taylor, *supra* note 111, at 335 (reporting that one month after being raped, half of survivors had not yet become sexually active).

164. Burgess & Holmstrom, *supra* note 163, at 651-52.

165. *Id.* at 653.

166. *Id.*

167. *Id.* at 654. According to one woman,

[a]fter I was raped, I had intercourse with my husband as a ritual gesture. (I had learned as a child to get back on my bike after falling, lest I never mount again.) Intercourse was very easy. It didn’t matter. I was an abandoned house. Vacated. Anyone or anything could enter.

Metzger, *supra* note 38, at 406. Male survivors of rape as a form of torture also suffer similar sexual disruption. See also VAN DER VEER, *supra* note 10, at 226 (reporting that symptoms of male survivors of sexual violence include “a reduction of sexual interest or pleasure, failure to attain or maintain an erection during sexual activity, premature ejaculation, delay or absence of an orgasm, and disturbing thoughts or feelings during sexual activity”).

168. Burgess & Holmstrom, *supra* note 163, at 653-54.

CONCLUSION

Under international law, rapes by government officials are generally not viewed as the infliction of torture but rather only as the infliction of ill-treatment. This view of rape denies rape survivors fundamental legal protections afforded to other torture survivors and reinforces myths about rape, thereby undermining women's equal right to dignity.

An examination of international and regional human rights regimes reveals that abuse is classified as torture or ill-treatment when government officials are involved and a minimum level of pain is inflicted. Torture is distinct from ill-treatment because it inflicts severe pain or suffering for an illicit political purpose. Applying this definition to cases of rape, national and international adjudicative bodies should find that, given the empirical evidence concerning the aftermath experienced by rape survivors, rape inflicts the level of pain required by the definition of torture. In fact, such bodies should acknowledge that rape survivors experience a dimension of suffering and isolation not experienced by other torture survivors. Thus, when determining if an individual case of rape constitutes torture, such tribunals should consider only whether a government was involved in the rape and whether the rape was committed for an illicit political purpose.

The time has come for international human rights law to recognize the pervasiveness and severity of rape and to punish, rather than forgive, the torturer and to compensate, rather than forget, the rape survivor. In the words of Sister Dianna Ortiz:

I am pursuing this case because General Gramajo and the other individuals involved in my surveillance, kidnapping and torture must learn that they cannot engage in such acts with impunity. They must be made accountable for their actions, and thus be discouraged from committing similar acts in the future.¹⁶⁹

There is simply no basis for international law to dictate that burning Sister Ortiz with cigarettes constitutes torture but that gang raping her does not.

169. *Declaration*, *supra* note 1, at 14.

